

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Application of New Century Telecom, Inc., (U-5912-C) for Approval of Stock Purchase Agreement and Related Transfer of Control.

Application 02-10-007
(Filed October 8, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
GRANTING THE SECOND MOTION TO FILE INFORMATION UNDER SEAL**

1. Summary

This ruling grants the motion filed by New Century Telecom, Inc. (NCT), to place under seal Exhibits 1 and 2 of the second amendment to Application 02-10-007 filed on June 3, 2004. Exhibit 1 contains NCT's financial statements for 2003. Exhibit 2 contains a monthly count of NCT's customers in California for the 13-month period of April 2003 through April 2004.

2. Requested Relief

NCT moves to place Exhibits 1 and 3 under seal because they contain "information [that] is extremely sensitive and confidential." NCT claims that the general public has no direct or substantive interest in this information. NCT also asserts that public disclosure of these Exhibits would allow NCT's competitors "to gain potential competitive advantage or to use the information in an unfair and potentially anti-competitive manner."

3. Discussion

The purpose of the California Public Records Act and General Order 66-C is to provide "access to information concerning the conduct of the people's business"

while counterbalancing the “right of individuals to privacy.” (Gov. Code § 6250.) In accordance with its purpose, the Public Records Act permits agencies to withhold records from the public when “the facts of the particular case [show that] the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” (Gov. Code § 6255.)

Perhaps one of the Commission’s most detailed analyses of the balancing of the public interest in an open regulatory process with a utility’s desire to shield information from disclosure was a case involving Pacific Bell. (*In re Pacific Bell* (1986) 20 CPUC 2d 232.) In that case, the Commission stated:

PacBell must understand that in balancing the public interest of having an open and credible regulatory process against its desires not to have data it deems propriety disclosed, we give far more weight to having a fully open regulatory process. (20 CPUC 2d at 257.)

The standard applied by the Commission is a stringent one. The mere fact that a utility labels a statement or a document “proprietary” does not make it so. In the *Pacific Bell* case, the Commission stated:

Certainly there are times to be concerned about full disclosure of proprietary data. Classic examples are customer lists, true trade secrets, and prospective marketing strategies where there is full blown – and not peripheral – competition. To make the assertion stick that there are valid reasons to take unusual procedural steps to keep data out of the public record (e.g., sealed exhibits, clearing the hearing room, or sealed transcripts), there must be a demonstration of imminent and direct harm of major consequence, not a showing that there may be harm or that the harm is speculative and incidental. (20 CPUC 2d at 252.)

NCT claims that it will be competitively disadvantaged from the public disclosure of Exhibits 1 and 2, but has failed to demonstrate substantial, direct, and immediate harm if the Exhibits are made available to the public. The asserted but unproven harm must be balanced against the public interest in the information. Here, there appears to be no public interest in the information, as no member of the public has intervened in this proceeding or asked to see the Exhibits. Therefore, NCT's unopposed motion is sufficient to tip the balance ever so slightly in favor of placing the Exhibits under seal.

Therefore, **IT IS RULED** that:

1. The motion of New Century Telecom, Inc. (NCT), to place under seal Exhibits 1 and 2 of the second amendment (filed on June 3, 2004) to Application 02-10-007 is granted for two years from the date of this ruling. During that period the information shall not be made accessible or disclosed to anyone other than the Commission staff except upon execution of an appropriate non-disclosure agreement with NCT, or on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

2. If NCT believes that further protection of the information filed under seal is needed, it may file a motion stating the justification for further withholding of the information from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than one month before the expiration date of today's protective order.

Dated July 14, 2004, at San Francisco, California.

/s/ TIMOTHY KENNEY

Timothy Kenney
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting the Second Motion to File Information Under Seal on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated July 14, 2004, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.